

**STATE BOARD OF EQUALIZATION
LEGAL DIVISION (MIC:82)**

450 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-3828

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October 14, 1993

Mr. R--- S. L---
A--- M--- S---
XXX --- --- Drive, Suite XXX
--- ---, California XXXXX

Re: SR -- XX-XXXXXX
T--- M--- XXX C---
Pump

Dear Mr. L---:

I am responding to your letter postmarked September 9, 1993, to the Legal Division. You attached a letter to you dated July 29, 1993, from Senior Tax Auditor Dolores M. Smith of the Arcadia District office stating that tax applied to AMS' sales of the T--- M--- C--- Pump, which is used in the treatment of lymphedema. You appeal Ms. Smith's conclusion.

I. FACTUAL BACKGROUND

You describe the use of the pump system as follows:

“The M--- XXX system consists of an air compression pump, five chamber sequential pneumatic garments and air hoses which connect the pump to individual compartments of the garment. Inflation pressure is indicated on the calibrated panel and pressure gauge. The pressure is variable, so it may be adjusted on a case by case basis....

“The range of garments available for use with the M--- XXX are full arm, full leg, half arm, and half leg. Two pneumatic garments may be used simultaneously with each pump via the use of a bilateral adapter.”

II. OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) “[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ...” (§ 6091.) “Exemptions from taxation must be found in the statute.” (“Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.2d 201.]”) The taxpayer has the burden of showing that he clearly comes within the exemption.” (“Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)”)

B. Prescription Medicines.

Section 6369, interpreted and implemented by Title 28, California Code of Regulations, Regulation 1591, provides that sales of medicine, when prescribed and sold or furnished under certain conditions for the treatment of a human being, are exempt from sales or use tax. (Reg. 1591(a).) Subdivision(b)(1) defines “medicine” to “mean and include any substance or preparation intended for use by external or internal application to the human body in the diagnosis, cure, mitigation, treatment, or prevention of disease and which is commonly recognized as a substance or preparation intended for such use.” However, Regulation 1591(c)(2) adds that “medicines” do not include “articles which are in the nature of splints, bandages, pads, compresses, supports, dressings, instruments, apparatus, contrivances, appliances, devices, or other mechanical, electronic, optical or physical equipment or article or the component parts and accessories thereof.” (Sales and Use Tax Regulations are Board promulgations which have the force and effect of law.) As a rule, then, items used to diagnose a condition or to apply medicine or treatment to the patient are not considered to be medicines.

Regulation 1591(b) does provide that certain items which might otherwise be considered as being devices, etc., are defined as “medicines.” The exemption which might apply to sales of this product is found in Regulation 1591(b)(5), which includes prosthetic devices and their replacement parts designed to be worn on or in the person of the user to replace or assist in the functioning of a natural part of the human body.

C. Tax Consequences to AMS.

In order to be considered a “prosthetic device” for sales and use tax purposes, we have previously determined that the item in question must be fully worn on the body - i.e., all parts of it are worn on the body of the patient. We have previously concluded that lymphedema pressure

garments do not qualify as prosthetic devices because (leaving aside the issue of whether or not they assist in the functioning of a natural part of the body) they are not fully worn on the body of the patient. While the patient wears the garment during treatment, the pump remains on a table beside or near the patient. Such items are thus devices or appliances excluded from the definition of "medicines" under Regulation 1591(c)(2) with the result that AMS' sales of them are subject to tax.

For your information, I have included a copy of Regulation 1591. I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid
Tax Counsel

JLW:es

Enc.: Reg. 1591

cc: Ms. Dolores M. Smith, Senior Tax Auditor, -- District